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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,833	03/22/2004	Raymond Giannelli	C016/7080US5	4229
21127 7590 06/26/2009 RISSMAN HENDRICKS & OLIVERIO, LLP 100 Cambridge Street Suite 2101 BOSTON, MA 02114				
EXAMINER NGUYEN, TAM M				
ART UNIT		PAPER NUMBER		
3764				
NOTIFICATION DATE		DELIVERY MODE		
06/26/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### Office Action Summary

**Application No.**

10/806,833

**Applicant(s)**

GIANNELLI ET AL.

**Examiner**

TAM NGUYEN

**Art Unit**

3764

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 5/22/09.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 10-21, 23 and 36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 10-21, 23 and 36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 10-21, 23 and 36 are rejected under 35 U.S.C. 102(b) as being anticipated by Root (326,247).

1. As to claims 10-21, 23 and 36, Root discloses an apparatus comprising a pair of left and right foot pedals (L) each having a foot sole receiving surface **for** standing on, the foot pedals being mounted on a frame (A) **for** movement in a back and forth direction along any one of a plurality of reproducible user selectable segments of an arcuate path between forwardmost upward and rearward most downward positions, a pair of left and right manually graspable input arms/handles (K) each pivotally interconnected to a respective one of the left and right foot pedals such that the left handle pivots forwardly together with forward and upward movement of the left pedal and backward and downward together with backward movement of the left pedal, and the right handle pivots forwardly together with forward and upward movement of the right pedal and backward and downward together with backward movement of the right pedal wherein the foot pedals are adjustable to move in an arcuate path of selected incline, the input arms are adjustable to move in a pivot path of selected degree of pivot, the pedals and input arms are interconnected to a pivot mechanism (I,T,S) adjustable to

a selected degree of pivot that adjust the arcuate path of the foot pedals and the degree of pivot of the input arms, the arms and pedals are interconnected to a reciprocating mechanism (F) that directs one of the left or right pedals to travel in the back and forth direction while simultaneously directing the other of the left or right pedals to substantially always travel in an opposite direction, the reciprocating mechanism comprises a rotating mechanism having a pair of pivot points (on disk F), disposed at substantially opposing 180 degree positions, interconnected to one of the left or right pedals and arms and the pedals and arms are interconnected to a respective pivot point by a link mechanism (J,H) (see Figs. 1-3 & lines 37-49 and 59-90). Root further discloses that foot pedals pivot or rotate less than about three degrees during movement between the forwardmost and backwardmost positions. As a matter of fact, it does not appear that the pedals pivot at all with respect to the axis defined by the pivot axis, M (see Fig. 1). Root also discloses that each of the foot pedals are mounted on the frame via a four bar linkage mechanism (A, G, I and the combination of J & H) (see Fig. 1).

### ***Response to Arguments***

Applicant's arguments filed May 22, 2009 have been fully considered but they are not persuasive.

2. Applicant argues that Root's apparatus does not support a user in an upright position. This argument stems from newly added limitations that the pedals each have a foot sole receiving surface for standing on "vertically". Examiner respectfully disagrees with this contention since a user could stand on the foot pedals in an upright

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position. Although the intended use of the Root apparatus is for a user to lay horizontally on the saddle, the structure of the apparatus also allows for a person to stand on the foot pedals in an upright position. Furthermore, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987). Applicant also argues that the foot levers "G" of the Root apparatus do not and cannot support the weight of the user yet applicant offers no evidence to come to support this argument. It appears that applicant is trying to argue that since the apparatus is deliberately not intended to enable a user to stand on the foot pedals, then the foot pedals are not able to support the user but there is no evidence to support this argument. Applicant also argues that the foot levers cannot and do not support a user in an upright position. Examiner respectfully disagrees with this argument. Although Root discloses the saddle or body support "O" bears the user's weight, that does not preclude the foot levers from being able to support a user in an upright position when, for example, the apparatus is turned 90 degrees so as to be perpendicular to the floor or when a user is standing on the foot supports when the apparatus is resting horizontally on the floor.

3. Applicant also argues that the foot pedals in Root's apparatus do not move between forwardmost upward and rearwardmost downward positions. Examiner respectfully disagrees with this contention since the foot pedals are attached to levers (G) that are pivotally attached to a base (A) wherein the rotation of the levers allows for

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the pedals to clearly travel forwardly and upwardly (toward the apex of the arcuate path) and rearwardly and downwardly. The portion of the pathway just before the apex of the arcuate path is a forwardmost upward position and the rearwardmost downward position is the rearward portion of the path where the pedals switch directions from going rearward to forward. It appears that applicant is arguing that the forwardmost upward position and the rearwardmost downward position is defined by the structural limitation of the instant invention but that language is not clearly disclosed in the claims. Applicant's argument regarding the momentum of the flywheel of the Root apparatus is irrelevant since the intended use of the Root apparatus does not preclude the structure of the Root apparatus from meeting the language of the claims.

4. Applicant also argues that the root reference is not analogous art but both the instant invention and the Root reference is an exercise apparatus. Applicant also argues that if the Root apparatus was oriented vertically, then the handles would not be moving forwardly and backwardly. First, the claims do not require a user to be standing on the pedals **during exercise** wherein the handles would be moving. Rather, the claims merely disclose that the pedals are capable of supporting a person standing uprightly thereon. Second, whether the Root apparatus is rotated 90 degrees or not, the handles will still move back and forth since they are attached to hand levers that are pivotally attached to base A and the arcuate motion of the hand levers includes both an upwardly and downwardly component and a forwardly and backwardly component.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to TAM NGUYEN whose telephone number is (571)272-4979. The examiner can normally be reached on Monday - Friday 9-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, LoAn Thanh can be reached on 571-272-4966. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

June 22, 2009

/Tam Nguyen/  
Examiner, Art Unit 3764

/LoAn H. Thanh/  
Supervisory Patent Examiner, Art Unit 3764